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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 278.

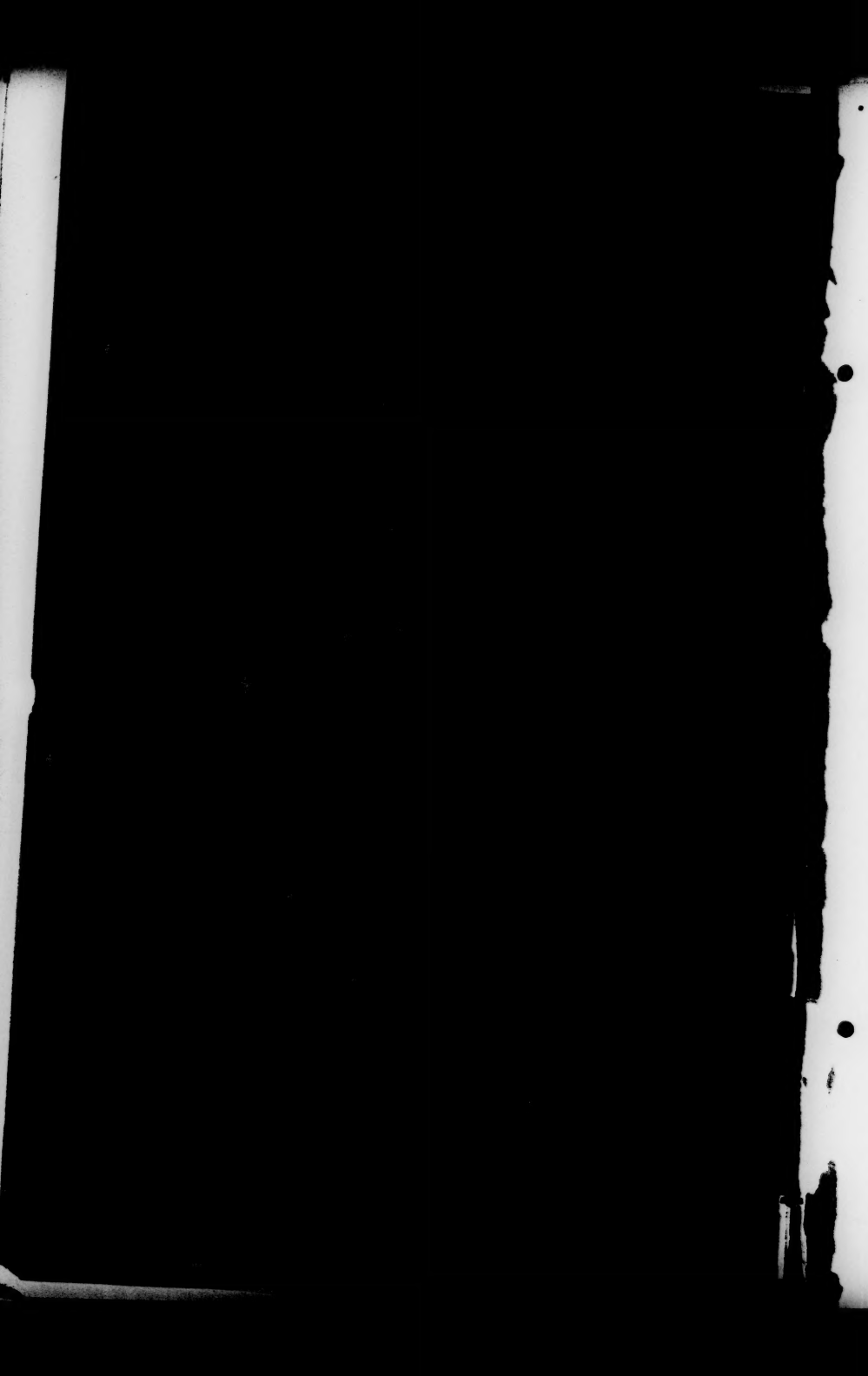
THE UNITED STATES, PLAINTIFFS,

vs.

AARON VAN AUKEN.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 22, 1875.



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1 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the western district of Michigan, continued and held at the city of Grand Rapids, on the eighth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the one hundredth.

Present, the honorable H. H. Emmons, circuit judge, & Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

THE UNITED STATES
vs.
AARON VAN AUKEN.

In this cause, on the third day of June, A. D. 1875, an indictment was presented in the district court for said district against the said defendant, for a violation of the second section of an act of Congress approved July 17, 1862, which provides "that no person shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received or used in lieu of lawful money of the United States; and every person so offending shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both, at the discretion of the court," which indictment is as follows:

2 UNITED STATES OF AMERICA:

District court of the United States for the sixth circuit and western district of Michigan, of the term of May, in the year of our Lord one thousand eight hundred and seventy-five.

WESTERN DISTRICT OF MICHIGAN, *ss:*

The grand jurors of the United States of America, empanneled and sworn to enquire in and for the body of the western district of Michigan, upon their oath present that heretofore, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and seventy-four, at the village of Bangor, in the county of Van Buren, in the district aforesaid, and within the jurisdiction of this court, one Aaron Van Auken, late of the county aforesaid, did circulate a large number of the obligations of the Bangor Furnace Company, a corporation organized April 18th, A. D. 1872, under and by virtue of the laws of the State of Michigan, for the purpose of the mining or otherwise procuring of iron ore, and the smelting and other manufacture of the same, and for other purposes, and doing business at said village of Bangor, on the day and year first above stated, to wit, one thousand of such obligations of the tenor and effect following, viz:

"BANGOR, MICH., *August 15th*, 1874.

"The Bangor Furnace Company will pay the bearer, on demand, fifty cents, in goods, at their store, in Bangor, Mich.

(Signed) "A. B. HOUGH, *Pres.*
(Signed) "CHA'S D. RHODER, *Treas.*"

Each of which said obligations was for a less sum than one dollar, and was intended by the said Aaron Van Auken to circulate as money, and to be received in lieu of lawful money of the United States, contrary to the form, force, and effect of the act of Congress, in such case made and provided, and against the peace and dignity of the United States of America.

3 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year last aforesaid, at the place aforesaid, and within the jurisdiction of this court, Aaron Van Auken, aforesaid, did circulate and pay out a large number of other obligations of the "Bangor Furnace Company," a corporation organized April 18th, 1872, under and by virtue of the laws of the State of Michigan, for the purpose of the mining or otherwise procuring of iron ore, and the smelting and other manufacture of the same, and for other purposes, and doing business at said village of Bangor, on the said first day of November, A. D. 1874, to wit, one thousand of such obligations, of the tenor and effect following, viz:

"BANGOR, MICH., *August 15th*, 1874.

"The Bangor Furnace Company will pay the bearer, on demand, fifty cents, in goods, at their store, in Bangor, Mich.

(Signed) "A. B. HOUGH, *Pres.*

(Signed) "CHA'S D. RHODER, *Treas.*"

Each of which said obligations last mentioned was for a less sum than one dollar, and was intended by the said Aaron Van Auken to circulate as money, and to be received and used in lieu of lawful money of the United States, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

JOHN H. STANDISH,
United States Attorney for the Western District of Michigan.

(Indorsed:) No. . District court of the United [States for the western district of Michigan. The United States vs. Aaron Van Auken. Indictment for circulating obligations less than one dollar. A true bill. F. W. Curtenius, foreman. Filed, June 3, 1875, in open court. Isaac H. Parrish, clerk. John H. Standish, U. S. district attorney for the western dist. of Mich.

4 To this indictment a demurrer was interposed, which is as follows:

UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth and western district of Michigan.

THE UNITED STATES }
vs.
AARON VAN AUKEN. }

And the said Aaron Van Auken, in his own proper person, cometh into court here, and, having heard the said indictment read, says that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Aaron Van Auken is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Aaron Van Auken prays judgment, and that by the court he may be dismissed and discharged from the said premises in said indictment specified; and the said Aaron Van Auken further specially demurs, w'ether the obligation as set forth in said indictment is embraced in any valid statute of the United States prohibiting the circulation of same in manner set forth in said indictment; and whether the 2d section of the act of Congress entitled "An act to authorize payments in stamps and to prohibit circulation of notes for less denomination than one dollar," approved July 17, 1862, is constitutional.

G. W. LAWTON,
Att'y for Aaron Van Auken.

This case having been transferred to this court and came on to be argued at this term, it occurred as a question whether the obligation as set forth in said indictment is embraced in any valid statutes of the United States, and also whether the act of Congress above referred to and set forth is constitutional.

On which question the opinions were opposed.

Wherefore on motion of John H. Standish, United States district attorney, it is ordered that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judge and certified under the seal of the court to the Supreme Court to be finally decided.

UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Isaac H. Parrish, clerk of the circuit court of the United States for the western district of Michigan, do hereby certify the foregoing to be a copy of the minutes, records, and files in said cause.

Given under my hand and seal of office, at Grand Rapids, this 8th day of October, A. D. 1875.

[SEAL.] ISAAC H. PARRISH,
Clerk.

(Indorsement on cover:) No. 278. The United States, plaintiffs, vs. Aaron Van Auken. Certificate of division. W. Michigan C. C. U. S. Filed 21st October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
AARON VAN AUKEN. } No. 278.

ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
AARON VAN AUKEN. } 278.

ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR UNITED STATES.

STATEMENT.

June 3, 1875, Van Auken was indicted in the district court for the western district of Michigan for a violation of the act of July 17, 1862, c. 196, § 2: "that no person shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States," under penalty of fine and imprisonment. (12 Stats., 592.)

Omitting caption, formal commencement, conclusion, and averments, the indictment set out the offence substantially thus: The first count alleging that "on the first day of November, A. D. 1874, at the village of Bangor,

in the county of Van Buren, in the district aforesaid," &c., "one Aaron Van Auken, late of the county aforesaid, did *circulate* a large number of the obligations of the Bangor Furnace Company, a corporation organized April 18, 1872, under and by virtue of the laws of the State of Michigan, for the purpose of the mining or the otherwise procuring of iron-ore, and the smelting and other manufacture of the same, and for other purposes, and doing business at said village of Bangor, to wit, one thousand of such obligations, of the tenor and effect following, viz: 'Bangor, Mich., August 15th, 1874. The Bangor Furnace Company will pay the bearer, on demand, fifty cents, *in goods*, at their store in Bangor, Mich. A. B. Hough, Pres. Chas. D. Rhoder, Treas.'; each of which obligations was for a less sum than one dollar, and was intended by said Van Auken to circulate as money, and to be *received* in lieu of lawful money of the United States," *contra formam statuti*, &c. (Record 1, 2; folio 2.)

The second count differed from the first only in charging that Van Auken did circulate "*and pay out*" a large number of such obligations intended by him to be received "*and used*" as aforesaid. (Record 2, folio 3.)

The indictment was demurred to, whereupon it was transferred to the circuit court, the judges there sitting dividing in opinion whether the obligation set forth is embraced in any valid statute of the United States, and also whether the above-cited act of Congress is constitutional. That brings the cause here for the decision of these questions. (Record 3, folio 5)

BRIEF.

The record order of stating the questions upon which the court below divided will be here reversed; and because that relating to the constitutionality of the act is the more general, comprehensive, and important, it will be first considered.

I.

The presumption is in favor of the legality of Congressional action.

Fletcher v. Peck (6 Cranch, 87).
Legal-Tender Cases (12 Wall., 531).
Com. v. Smith (4 Binney, 123).

If power to issue and control the coinage of the country were not expressly conferred upon Congress, it might reasonably be inferred from the clause authorizing that body to regulate commerce; since the only means (money or its representative) by which interstate or international commercial intercourse is practically possible must be amenable to such regulation.

The power "to coin money and regulate the value thereof" is exclusive.

It gives the right to prohibit the manufacture of anything, of any material whatsoever, "intended to circulate as money," which does not emanate from Federal authority and bear its sanction. The right of prohibition, to this extent, is wholly independent of the question of the power of Congress itself to make anything else besides metallic coins a legal tender.

The obvious purpose of the statute under examination

is to make sure that nothing issued under local authority or by individuals should displace, or subserve the uses of, the circulating medium (metallic or other) provided by Congress. Thus this statute does not depend upon the constitutionality of the legal-tender acts. It might be valid if they were not. We accept as a premise, however, the authoritative decision of the ultimate tribunal that the legal-tender acts were valid. (Legal-Tender Cases, 12 Wall., 457, 529, *et seq.*)

The statute here discussed was in effect declared valid in Veazie Bank v. Fenno, 8 Wall., 548–9, by some of those judges who questioned the power to make the notes a legal ten der as to *past* contracts. (Ib., 603.)

Many of the ablest of those jurists who were unwilling to concede to Congress the power to make aught but gold and silver a legal tender agreed with judge Agnew, who said: "Having the right to borrow money, Congress has an undoubted right to issue evidences of indebtedness therefor; and I will not dispute their right to declare these evidences lawful money, so that men may deal with it in *future* contracts; but I do very earnestly deny the right and power of Congress to make such lawful money a tender in payment of *past* contracted debts." (Shollenberger v. Brinton, 52 Penn. St., 38.)

The power to make their own evidences of indebtedness "lawful money" implies the competency to declare that no other body corporate or politic, and no individual, should issue any obligation "intended to circulate as money" in competition (so to speak) with that authorized by Congress. (12 Wall., 541, *et seq.;* 8 Wall., 548–9.)

The government were not thus "left disabled and im-

potent as to the only means of securing the objects in contemplation." As Judge Daniel proceeds to declare, "If the medium which the government was authorized to create and establish could immediately be expelled and substituted by one it had neither created, estimated, nor authorized—one possessing no intrinsic value—then the power conferred by the Constitution would be useless, wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are by the Constitution authorized to perform, they are, when the public good requires it, bound to perform; and, on this principle, having emitted a circulating medium, a standard of value indispensable for the purposes of the community, and for the action of the government itself, they are accordingly authorized and bound in duty to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the influx and substitution of a spurious coin in lieu of the constitutional currency." (U. S. *v.* Marigold, 9 Howard, 567–8.)

Jefferson wrote Mr. Crawford, June 20, 1816, that he (J.) was in favor of "the suppression of all paper circulation during peace, and licensing that of the nation alone during war." (4 Jeff.'s Corresp., 285.)

See Mr. Calhoun's opinion, quoted in Metropolitan Bank *v.* Van Dyck, (27 N. Y., 433–4).

The fractional scrip issued by the United States was just as much a loan of the sums represented thereby as were the bonds; the difference being only in amount and the accruing of interest; so that this subsidiary currency was really most beneficial, proportionately to the amount that could be employed, of any that was put into circulation. The ability of the people to borrow, and the practicability of using this form of loan,

were limited, and would be still further contracted if corporations like the Bangor Furnace Company could virtually compel its employés to accept its scrip in payment of wages, &c., in lieu of that of the government.

This statute was enacted, then, to subserve a purely federal purpose, *bona fide*, and was appropriate to the desired end, even if not imperatively necessary to its attainment.

It is well remembered that when, at the outbreak of the war, specie payments were suspended, and gold and silver disappeared from daily business transactions almost as utterly as if "the vexed ore" had reclaimed them, almost every country grocer made change and virtually obtained loans by the issue of small scrip. It was a newly-developed, easy method of borrowing. The country had the same right to avail itself exclusively of this privilege, for war and governmental purposes, that it had to issue notes of larger denominations and to control the banks of issue all over the land. It was exercising an ordinary incident of sovereignty. (12 Wall., 545.)

The act of July 17, 1862, c. 196, § 2 (12 Stats., 592), did not purport, nor was it designed, to hamper citizens or corporations in obtaining credit in the ordinary way, and representing their indebtedness by the customary documentary proof; but it did restrain them from resorting to a new and unusual form, then first adopted, for the purpose of creating a currency—a medium of exchange—and not solely nor principally to evidence an indebtment; though the issue and acceptance of it might create the relation of debtor and creditor to that extent.

II.

Believing the decisions of this court settle the entire constitutionality of this act of July 17, 1862, c. 196, § 2, we proceed to inquire whether or not the emission and circulation of the instruments described in the indictment violated its provisions.

The demurrer admits all facts well pleaded. The vital fact is the *intention* of Van Auken—criminal, if his purpose violated this law; otherwise, innocent. It is distinctly averred in the first count that he did circulate a large number of these obligations, each by him intended "to circulate as money and to be received in lieu of the lawful money of the United States." The second count avers the same facts, and that he intended not only that they should be received, but also paid them out, that they might be "used" in lieu of lawful money. (Record, 1, 2.) The fact of unlawful purpose could not be any more plainly stated; naming time, place, person, and precise means whereby the law was violated, in the language of the statute; saying that this person, by the method stated, then and there did the very thing forbidden. No essential fact could be any better pleaded.

Van Auken's act, coupled with the intent which governed it, constitutes the crime. That act and intent might have been attempted and carried out with inartistic or unusual means; but these obligations were well calculated for his alleged purpose.

Probably argument will be made that they did not come within the inhibitory clause of the statute because payable in goods. The reply is that it is not the circulation of obligations calling for money only that is for

bidden, but of any obligation for less than a dollar "intended to circulate as money [circulates], or to be received or used in lieu of lawful money." It is sufficient that it is calculated and designed to subserve the uses of *current* money.

It cannot be assumed upon demurrer that these notes were not so intended. Their tenor does not negative the legal possibility of the truth of the statements of the indictment, but the contrary. It shows a thousand of them of that precise character, each for the even sum of fifty cents, issued by the Bangor Furnace Company, on the fifteenth day of August, 1874. That they are said on their face to be redeemable "in goods," payable on demand, does not show that it was not expected they would pass freely from hand to hand for a long time before being presented for payment. Of course, time is not material to be strictly proved as laid; but upon demurrer we must assume the dates to be correctly stated. Then it is apparent that this large number of fifty-cent obligations were in the hands of Van Auken, and were paid out by him, November 1, 1874, two months and a half after their date; and were thus paid out in Bangor, the place where they were payable, and where he would have presented them for payment, had he not intended to circulate them, and that they should be received and used as money. Whether he has any connection with the Bangor Furnace Company, is identical with it—its *alter ego*—or wholly independent of it, does not appear. In either case, *his* intention, and presumptively that of the company, to have this scrip circulate as money is apparent. Even if their language did not indicate it, the United States would not be precluded from showing the fact, especially if the purpose be a fraud

upon the Federal statute and to evade the public policy so declared. But the phraseology of these obligations shows the design. They call for no specific article—five pounds of sugar, a pound of tea, or anything of that kind—nor for fifty cents' worth of any such articles,—cheese or nails. *The only thing in which* (if their payment can be enforced) *they are certainly solvable is the coin or lawful money of the United States.* They do not promise anything else specifically; so that, if the parties cannot, by some extraneous arrangement, agree upon the commodity to be received, the payment is to be in money. If the holder has the option to demand such goods as he chooses to the requisite value, then, as a medium of exchange, these obligations possess the property of money, to wit, the facility of being immediately converted into whatever will satisfy the bearer's wishes.

It may be further observed that the very thing these notes are fitted, and evidently designed, to accomplish, is the precise thing against which the penalties of the law are denounced; and if they escape, it is because of cunning phraseology on the part of the maker of the instruments and a strict construction of the statute by the court.

This circulation of private paper; the usurpation of banking business by manufacturing or commercial corporations or persons, has frequently been the subject of animadversion by the legislatures of many of the States; notably of Michigan. By act approved March 22, 1838, it was made "unlawful for any individual, company, or corporation to issue, pass, or offer to pass, within this State, any note, check, draft, bank-bill, or any other paper currency of a less denomination than one dollar." The second section refers to

the prohibited article as "any note, check, bank-bill, or other *paper medium, evidently intended for common circulation*, of a less denomination than one dollar," &c. (Compiled Laws of Mich. (A. D. 1871), pp. 2129, 2130, ¶¶ 7749, 7750; People v. River Raisin and Lake Erie R. R. Co., 12 Mich., 389.)

The construction given in People *v.* Wells (8 Mich., 104) to another statute forbidding the "issuing" of paper in the similitude of a bank-bill is not pertinent here, because it says "paying out" is different from the original act of "issuing"; whereas the paying out, with intent that it be used in lieu of money, is the thing here prohibited.

That act the demurrer admits Mr. Van Auken did. Whatever the expectation of those who issued this paper, he intended it to circulate, be received, and used as and in lieu of money, and paid it out with that intention.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
v.
AARON VAN AUKEN. } No. 278.

CERTIFIED FROM UNITED STATES CIRCUIT COURT FOR DISTRICT OF MICHIGAN.

PLAINTIFF'S NOTES OF REPLY TO DEFENDANT'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
v.
AARON VAN AUKEN. } No. 278.

CERTIFIED FROM UNITED STATES CIRCUIT COURT FOR DISTRICT OF MICHIGAN.

PLAINTIFF'S NOTES OF REPLY TO DEFENDANT'S BRIEF.

By way of reply to the defendant's argument, it may be first generally remarked that, after electing to raise the debatable questions of law upon demurrer, he proceeds to discuss them upon facts not stated in the indictment, directly nor by any fair inference. For instance, there is no record authority for the assumption found at the bottom of his first page, that the orders varied in amount; nor for that, near the top of the third page, asserting the orders to have been given in exchange for labor. Perhaps the acceptance of these statements and others equally outside the record might not affect the result; but we prefer to confine ourselves strictly to the indictment, because that is the proper course.

Not only is the position stated, near the top of page 3, that these orders are delivered in payment for labor dehors the record, but, on the contrary (as previously noticed), the fact that a thousand of them, for just 50 cents each, are paid out three months (nearly) after date, by Mr. Van Auken, in Bangor (he having no stated connection with the makers), negatives any such inference.

The proposition which follows this statement, that it is the consent of the recipient which gives value to the bill, is equally true, whether payable in money or in goods; and applies as fully to bank bills of any denomination as to this fractional currency. It does not appear, however, whether a new credit is given to the company or not; the allegation that there is not rests wholly upon the unauthorized assumption that these emissions were made in payment for labor.

But one thing *is* quite apparent, the argument of counsel, near the middle of the third page, to the contrary notwithstanding; these instruments *do* dispense with currency and are a substitute therefor. Whether delivered in payment for labor or as a means of obtaining a loan or credit, they are the medium by which such labor or credit is converted ultimately into goods, and thus, whether they purport to be so or not, are a "substitute for currency." Even if true, that when once used for obtaining goods these bills became *functus officio*, the indictment alleges that before their function in this respect was fully performed the defendant intended they should circulate and be used as and in lieu of money. To supplant the national currency, and to work the very mischief this statute was intended to prevent, it is not necessary that the paper should call for money,

or be a moneyed obligation; it is enough that it is of a character and used with an intent to take the place of the lawful money of the United States.

The statute prohibits the use of any note, token, "or other obligation for a less sum than one dollar, intended to circulate as money," or in lieu thereof. A promise to pay a certain amount in specific articles is not only an "obligation" for that sum, but is termed by many courts a "note." (Aldrich *v.* Albee, 1 Maine, 122; Bixby *v.* Warren, 5 *ib.*, 192; Wyman *v.* Winslow, 11 *ib.*, 398; and many others.) At all events, the use made of this very scrip indicates it to be "an obligation intended to be used in lieu of lawful money." Denying that they are either of the specific things enumerated in the statute, the respondent cannot say that these are not "obligations:" and that word was intended to cover other things similar in *use* to those specifically mentioned. If "verbal promises," which counsel suggests on page 5, are practically susceptible of being circulated as money and received and used instead of it, so as to supplant the currency issued by the government, they are within the terms of the statute—otherwise not. The whole difference between us is that he lays the whole stress of his examination upon the word "obligation," while we say the significant phrase is that relating to the issuing of such an obligation as can be used, and is intended to circulate, as money. He would argue that the law restrains the making or use by parties, *inter sese*, of any note or obligation for less than a dollar. We say it only prohibits the attempt to put them into general circulation. He would subject to or exempt from punishment according to the phraseology of the document; we, according to the use of which it

was capable and which the party proposed to make of it. It is personal intent which the law regards. Car-tickets or those issued by barbers or milkmen are not intended for general circulation, nor to be used as money. Their purpose is to prevent embezzlement upon the part of employés. But it may be that if a man, under the pretext of desiring them for their legitimate use, should accumulate a large quantity of such tickets and try to force them into general circulation as change, he might make himself liable under this statute. The question would be of his *intent*.

EDWIN B. SMITH,
Assistant Attorney General.

DEFENDANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

No. 278.

THE UNITED STATES, PLAINTIFFS,

versus

AARON VAN AUKEN, DEFENDANT.

THE UNITED STATES
vs.
AARON VAN AUKEN.

DEFENDANTS BRIEF.

THIS case comes into this court from the circuit court sitting in the Western District of Michigan, on motion of the Government, because the Judges of the circuit were opposed in opinion upon the two questions presented by the record.

It may be remarked that this is one of a number of similar cases involving those two questions, and all are brought against parties connected or doing business with the Bangor Furnace Company. This company is organized under the laws of Michigan to manufacture iron from the native ore, and is located at the village of Bangor in that state. Like most other similar works, it is located at a distance from the more densely settled and better provided sections of the country, and while employing many men in the humble but exclusive work of fitting the ore and preparing the fuel for the furnace, the company are obliged to provide an easy way for these men to get the domestic supplies required for themselves and families. To do this they established their store; and to prevent a multiplication of accounts with the men they gave them, when requested, orders on this store for goods. The superintendent at the works, who kept the time account of each man, issuing the the orders, of course charging the value thereof up against the men, to be settled for on the regular pay days.

The orders are in form and read as follows, excepting as to the amount which will vary with the order.

Page 1. folio 2, Record.

"BANGOR, MICH., *August 15th*, 1874.

"The Bangor Furnace Company will pay the bearer, "on demand, fifty cents, in goods, at their store, in "Bangor, Mich.

(Signed) "A. B. HOUGH, *Pres.*

(Signed) "CHA'S D. RHODES, *Treas.*"

And it is charged in the indictment that each of "said obligations was for a less sum than one dollar, and was intended by the said Aaron Van Auken to circulate as money, and to be received and used in lieu of lawful money of the United States, contrary to act of Congress in such case made and provided."

The act referred to, is entitled "an act to authorize payments in stamps, and to prohibit circulation of notes for less denomination than one dollar;" approved, July 17, 1862, found on page 316 of acts and resolutions of Congress, of the 2d session, 1861–2, and on page 711, §3503, R. S., with some change in its phraseology, and is as follows:

"§2. No private corporation, banking association, firm, or individual shall make, issue, or circulate, or pay any note, check, memorandum, token, or OTHER OBLIGATION for less sum than one dollar, intended to circulate as money, or to be received or used in lieu of lawful money of the United States; and every person so offending shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both at the discretion of the court."

Also, see page 1, of record, folio 1.

Now, the first question is, Does that statute embrace the instruments set out in the indictment?

The instruments plainly read without any ambiguity whatever, — page 1, of record, folio 2,— "The Bangor Furnace Company will pay the Bearer, on demand, fifty cents, in goods, at their store in Bangor, Michigan."

17. Mass. 485 ; Beckw

The plain understanding, then, is that this company promises to deliver to the bearer, on demand, at their store, goods to the amount in value of fifty cents. That is the sense in which they are understood by the public, at Bangor, in which they take effect. They are delivered by the officers of the company to their men in payment for their labor—that is, the instrument *orders* goods in payment of the labor performed.

Without the *consent* of the man who receives the order, there is no value to it. Value only attaches to it by the consent of the man receiving it, as he gives the consideration for it. Nor is there any new credit given to the company by the reception of these papers. It is for a pre-existing credit given to the company that they are taken; and if the goods are delivered as promised by the terms of the order, a payment by the company to that extent is made.

The same amount of currency is used. These instruments dispense with no currency. They do not purport to be a substitute for currency. They call for goods only, in value to a specified amount, and the goods have to be paid for by the company.

There is no registry of these obligations, nor are they numbered. Each one, for ought appears, having been once used for obtaining goods becomes *functus officio.*; and we see nothing in this paper but the contract of the Furnace Company to deliver goods to the party holding the order, for the consideration already received by the company.

They are not a money obligation; nor are they instuments calling for money; nor could money be obtained on them, unless by the way of damages for the breach of the contract, through failure of the company to furnish the goods, when demanded, according to its terms.

They have not the nature of a money obligation, nor

do they purport to represent money. They are not "checks," "notes," "memorandum," nor "tokens," terms used in the statute referred to; and whether they come under the head of "other obligations" as that term is used in the statute, depends upon whether any and every "other obligation" than money obligations, or those in terms calling for money, are so included. For these are *chattel* obligations—that is, they call for chattels and not money.

If the words "other obligations" used in the statute includes "chattel" as distinguished from "money" obligations, we ask, are the tickets issued by rail road, steamboat, ferry boat, street car companies included? Indeed, are those issued by the proprietors of barber shops, bath houses, soda fountains, by milk men, and innumerable others included? For such contracts, like these at bar, are negotiable; they go from hand to hand until used; aed are for all amounts from five cents upwards. No one mistakes the nature of these obligations. They are matters of convenience, but assuedly are not currency, thought somewhat current.

The fair interpretation of the phrase "other obligation" as it occurs in the statute will limit its operation to such obligations as purport, by their terms, to promise, or stand for money, and not to those that express and call for goods, labor, or pleasure. Indeed it may be safe to say it has no force whatever in the statute.

The phrase "other purposes" has been passed upon in Town of Fishkill v. Fishkill and Beekman Plank Road Co., 22 Barb., 634, cited in support of the same phrase in Mich. by Judge Cooley, who says: "But the only object mentioned in the title to this act is the preservation of the Muskegon river improvements. The words "other purposes" have no force whatever. Ryerton v. Utley, 16 Mich. 269.

Besides, this being a criminal statute will be construed strictly, and will be limited in its aplication both to that class of obligations that are known and purport to be "money obligations," and to those persons who pursue the calling or occupation of buying and dealling with obligations of that nature.

Assuredly, by giving an interpretation to the phrase "other oblagations," which will include those at bar, the door will be opened to an illimitable range of subjects. Can anything that represents an obligation be included if of a value of a part of a dollar? Could verbal promises be included? They are "other obligations" certainly.

Prof. Ames says, in his Science of the Law, page 261, "The real securities that may be resorted to (for the citizen) are the creation of no crimes in which the criminal act is not capable of being described with the highest amount of definiteness." Judge Story says, in U. S. v. Breed, 1 Summer, 159, in construing a revenue law, "we are not to strain to reach cases not within their terms, even if we might conjecture that public policy might have reached those cases."

But we say here, that *only* by extreme construction, can the obligations at bar be embraced within the statute.

But the Government may admit that these are chattel obligations as distinguished from money obligations, and yet the respondents be held to answer, if it is shown on the trial they have either made, issued, or circulated, them, because it is charged in the indictment that these obligations were "intended by the party respondent to circulate as money, and to be received and used in lieu of lawful money of the United States."

In answering this, we say, the obligation, as set out in the indictment, on its face, and by its terms, negatives

any intent to represent money by it. It says GOODS at their STORE, and as we remarked before, no money is demandable by it. There is no contract for money, and money could only be obtained by way of suit and damages awarded through failure to deliver the goods when called for.

His Honor, Justice Hunt, says, U. S. v. Isham, 17 Wall., 496; "It is not permissable to the courts, nor is it required of individuals who use the instrument in their business, to enquire beyond the face of the paper, * * * * nor is every man bound to inquire, before he receives the instrument, whether there are not outside circumstances that may affect its nature."

If the learned District Attorney had not set out the instrument in this indictment *in hac verba*, but had alledged that the party charged was guilty of making, or circulating a certain obligation of less demomination than one dollar, which was intended to circulate as money, etc., and on the trial had produced these obligations, would there not havn been a fatal variance? It seems to me that our learned friend saw *that* danger and has sought to avoid it by the form of his indictment.

Further, the statute plainly reads—no person shall make, or circulate any check, note, or token *intended* to circulate as money. The indictment reads as plainly that the respondent did make and circulate the obligation set out, which *he* intended to circulate as money, etc. So the charge is not that the respondent did circulate an obligation *which* obligation was intended, designed for, payable in money, but that he did circulate the instrument set out, a chattel obligation, but which he intended should be received and used as money. It seems to me that there is a palpable and marked distinction here to be observed. It is that the instrument

which designs, purports money is the thing prohibited, if any thing is by the statute, and not that the motive and the intent of the party who has used a chattel obligation is enquirable into. It is all the difference between confining the operation of the statute to the legitimate and defininite purpose of prohibiting illicit currency, paper money, and punishing by fine and imprisonment any individual who seeks to make use of a chattel contrct in the way of business.

Dr. Lieber, Hermeneutics, chp.3, §3, in discussing whether construction may authorize the extension of a penal statute to cases not within the letter, says: "In penal judicature no legal action can take place in case unprovided for by law, yet the Chinese code applies construction of this sort even to offeses and crimes."

Assuredly this elementary principle will not be overridden to include the obligations in question within the statute.

Neither the letter of the statute nor public policy require it.

II

The next question is of great importance. It is whether the 2d section of the act referred to is valid or constitutional.

It may be observed that the demurrer does not raise the question whether the Bangor Furnace Company may or may not, by virtue of its act of incorporation, issue currency; but raises the question whether the act in question, broadly including *all* corporations, banking and others, and prohibiting with pains and penalties, any from issuing such currency, is not an unwarranted assumption of legislative power and therefore void. On this ground we think it is.

In construing statutes all elementary writers direct attention to the times and occasions of its enactment, and we may derive some information by a brief reference to the origin and history of this statute.

In the Congressional Globe, 37th Congress, part 4, pages 3405–6, for the House, and page 3402, for the Senate, will be found this brief account of the statute.

July 17, 1862, the last day of the session, Mr. Hooper asked the unanimous consent to introduce this bill. Objection being made, on call of the yeas and nays, the rule was suspended and the bill introduced and read the first and second time. Mr. Hooper then asked the Clerk to read a letter from the Secretary of the Treasury to the Chairman of the Ways and Means, which was done.

The letter asked for the enactment of the law, but the Secretary pointedly says, among other things, "of course the enactment of this law should be accompanied with a prohibition of the circulation of tokens and certificates for fractional parts of a dollar, and *should be limited in duration to the existing rebellion.* Should Congress see fit to adopt this expedient, a return to the existing basis, on the termination of the insurrection, will be practicable and easy."

Mr. Hooper immediately, on the reading of this letter, moved the previous question; which, however, was withdrawn to allow Mr. Phelps to be heard, he to renew the demand on yielding the floor. In the course of his remarks, he said:

"If Congress has the right to prohibit the issuing of paper money by any corporation of a less denomination than one sollar, it has the right to prohibit the issuing of paper money by any corporation in the country of any amount. I do not believe that power is conferred

on Congress. I therefore believe the bill to be unconstitutional; and whenever Congress proposes to prohibit banks from issuing any paper money at all this act will be cited in support of the measure."

The bill was then passed and went to the Senate, and the record there is briefly this and no more: "On motion of Mr. Fessenden the H. R. No. 579, to authorize payments in stamps and to prohibit the circulation of notes of less denomination than one dollar was read three times and passed."

In a few hours after the House received a message from the President briefly announcing that he had approved the bill.

The only discussion had upon the bill in either House was the brief objection of Mr. Phelps, and he fairly raised the question of its constitutionality.

The provisions of the bill are sweeping. It makes penal the circulating and using bank bills, checks, drafts, and promissory notes of a denomination less than one dollar. Assuredly, if Congress can prohibit obligations under one dollar in amount, it can prohibit those of a dollar or of several or many dollars.

What clause of the Constitution warrants this assumption?

Many years ago in the elaborate case of Briscoe v. Bank of Commonwealth of Kentucky, 11 Pet. 257, see pages 316-17, Mr Justice McLean, speaking for the majority of the Court, says:

"A State cannot emit bills of credit, or in other words, it cannot issue that description of paper to answer the purposes of money which was denominated before the adoption of the Constitution bills of credit. But a State may grant acts of incorporation for the at-

tainment of these objects which are essential to the interests of society. This power is incident to Sovereignty and there is no limitation in the Federal Constitution on its exercise by the States in respect to the incorporation of banks."

This interpretation of the Constitution has not been overruled by this Court and must be the law to-day.

In the great debates upon the bill to re-charter the U. S. Bank, and upon the removal of the U. S. deposits the foregoing doctrine was advanced and upheld. See Benton's Thirty Years in the U. S. Senate, vol. 1, page 457. That learned author says Congress has no constitutional power to forbid the circulation of small notes below $20 by banks, and such, I believe, has been the understanding of the nation—throughout all of its branches of government—both state and federal, executive and judicial.

In a number of cases this Court has laid down the doctrine that Congress may *control* the currency of the country. Veazie v. Fenno, 8 Wall. 549. Hepbrun v. Griswold, id. 616.

But the Court has as yet stopped short of affirming a power in Congress to prohibit the issuing of currency by corporations under State authority, and that question is now raised.

Though it may be admitted that Congress may regulate and control the issue of currency to a great degree, it certainly does not follow that it may prohibit such issue altogether—that it may keep out or put out of existence that which a State, acting in its sovereign capacity, may authorize to exist. The powers are not the same.

Although the exercise by Congress of the power of control may greatly impair the value of the right of issue granted by the State to the corporation, yet the power is not necessarily destructive, and only by unwise legislation, as by excessive taxation, etc., can it be made prohibitive. For, although Congress provide its own paper as currency, that is borrow money that way of the country, it does not follow that it may invade the sovereignty of a State and prohibit the exercise of a conferred franchise, on the ground that having undertaken to provide this currency it may exclude the citizens from competing therewith. U. S. v. DeWitt, 9 Wall. 41.

Now Congress, by its fractional or postal currency acts, borrowed $50,000,000 of the people, as doubtless it could do. But the constantly recurring question is where do we find its power to prohibit all others from making such loans too? Must all other borrowers withdraw from the street when Congress enters? Of course after the king let no one speak.

But this is absurd. The government and its finances are ruled by a far different law. The nation primarily is not a borrower. It takes directly and as it needs from the people of their property sufficient for its maintenance, and it obtains money by borrowing only in a secondary capacity. That is, in taxing, its power is exclusive, but in borrowing it is not exclusive, it is competitive.

There is absolute need that the highest authority known to society should exclusively determine the quality and quantity of metal in coin. That duty is imposed by the Constitution upon Congress. Also, States are prohibited from making anything except such coin legal

tender, and they are also forbidden to emit bills of credit. But in none of these provisions do I find the power, either directly or by reasonable construction, conferred enabling Congress to enter and occupy exclusively in any form the money market as a borrower.

Indeed the idea is negatived by the power of Congress to tax, directly conferred, and to take without compensation or return. Has Congress the power to make a forced loan in any form? Assuredly not; but it may tax by general uniform law, that the burden may rest equally over the land. When Congress anticipates its taxes by the use of its credit it contracts and enters upon mutual agreements, where minds meet, or there is no credit, as this forbids exclusiveness. Wherefore if Congress, to make a loan of $50,000,000 through the form of fractional or postal currency, can prohibit credit given in the form at bar, it assuredly may prohibit credit given in any other form to banks or others, in order to facilitate its own methods of loaning money.

In brief, the matter at bar is one of the innumerable forms of debt and credit adopted by the business men of the country, and if Congress has the power to prohibit this, the door is opened for the exercise of much broader and far more dangerous powers, and I cannot concede such a power to be conferred upon it.

GEO. W. LAWTON,
Counsel for Van Auken.

Additional Brief of Respondent.

I wish more directly to answer certain of the chief points made in the able argument for the government.

First. On the constitutionality of the act. We do not concede that Congress has authority under the constitutional provision which authorizes it to regulate commerce, to *control the* CURRENCY *of the country* to the extent claimed; for there is *no express* power given to Congress anywhere in the constitution *to control any currency* but its own. Indeed, the word *currency* is not to be found in the constitution. When we consider the numerous *kinds* and *sources* of currency, we are startled at the assertion of an almost omnipotent power in Congress. It reaches every form of debt and credit and probes the domestic relations of every man, woman and child in this land. Almost everybody issues negotiable evidences of debt. Railroad Corporations fulfil their functions by such means; school districts build school houses; cities, towns, and villages make their improvements by the same instrumentality; banks of issue, banks of deposit, and of exchange carry on their operations by negotiable paper. The people constantly handle and pass from one to another checks, drafts, certificates of deposit, certified notes, etc. *ad infinitum*, and which express all amounts, and daily aggregate millions of dollars. *Can Congress control all this?* During the past few years Congress has issued very many forms of negotiable paper—evidences of debt. Its fractional notes, demand notes, compound interest notes, 7:30 bonds, etc., etc., and has paid for labor and supplies furnished it with their aid. They went right into use with this medly of current obligations from all sorts of private sources as well as public, and together

constituted and now constitute the *paper currency of the country*. Parties dealing all the time exercising *their* option in which and with what currency the transaction in hand shall be carried on. Now, assuredly, Congress can enter this field of debt and credit, as any other one may, for it may borrow money on the credit of the United States, but why or how may it assume to control and regulate all loans? To do so would be to abrogate its power to borrow, since borrowing, as before said, implies free will—the offering and acceptance of terms upon which a loan is made.

It may illustrate our subject, and in this connection it will not be uninteresting, to recall the history of an attempt to regulate and control the dealings and transactions of individuals in the interest of the United States paper currency. On June 17, 1864, under the pressure of pending emergencies, an "act to prohibit certain sales of gold and foreign exchange" was approved, and on July 2, 1864, a bill to repeal it was approved, (13 Stat., 132, 344). It only took fifteen days experience of a statute prohibiting sales of gold and foreign exchange, except under the regulations prescribed in the act, under penalties of fine and imprisonment for violation thereof, to satisfy the most tardy in conviction that such a law was *not* "necessary and proper" to carry into effect the power of Congress to coin money and regulate the value thereof, or to regulate commerce, or to borrow money on the credit of the United States.

Some interesting criticism was made by able Senators upon what was "necessary and proper" to carry into effect the "foregoing powers" during the discussion of this bill. (Cong. Globe, 1863, '64, pp. 3,062, 3,446, *et al.* See index.) Bear with me in noting briefly a very few of them. Mr. Sherman, who reported the bill from the committee, said the object of the bill was "*to prevent a depreciation of paper money.*" Mr. Fessenden said "I suppose it comes within our power to do anything that is *necessary to protect the cur-*

rency from depreciation. If the bill cannot be defended on that ground it is not defensible upon any ground."

Mr. Cowan, arguing to show that the bill would not protect the currency and therefore was not a necessary and proper law, said it was levelled against betting on the price of gold from day to day. That the values of gold was stationary and depended upon itself. That the value of the paper currency fluctuated. He made this illustration: "If S bets gold will be worth 200 next Monday, and J bets it will be worth 250, you have two parties; one, S on your side, if you please, and the other J against you. What do you confess by this bill? You confess, in the first place, that these men are influencing the price of gold, and in the second place, that your backer is the weaker, and *you want to throw the Government into the scale* in order *to help force up your credit.*" So in the matter at bar, it may be asked is it a necessary and proper exercise of its power to coin money, to borrow money on the credit of the United States, or to regulate commerce; for Congress to prohibit by fine and imprisonment the circulation of due bills, and orders, and notes of private parties, *circumlocum* where they are known and get credit, on the plea that it will help sustain the credit of the United States, limit the credit of private enterprises? I cannot concede it.

But Mr. Reverdy Johnson took part in the debate, and among many other things said, touching the right of Congress to interfere with the paper currency of the country: "Congress has no power to interfere with the issue of State banks. It is a great question—one upon which my opinion has long since been formed. I may be mistaken in it, but if I am, I err in common with the men by whom the Constitution was formed and those who were called upon to expound it in its earlier days, and who were more or less parties to the forming of it. In the Federalist, that commentary which is so familiar to us all, and which aided so

greatly to the adoption of the Constitution by the people, the right of the States to establish banks of any kind was clearly conceded." And he asks, touching the broader question involved: "If you have the authority to interfere with one species of currency of bank issues, in order to keep down the price of gold, why is it that *you have not the authority to interfere with the whole business of the citizen of the United States?*" And he refers to the immense business now carried on, domestic as well as foreign, by means of negotiable evidences of debt which go into and constitute the currency of the country, and asks: "Can Congress prohibit it?" And he pointed to that first and chiefest power of Congress enumerated, viz: *the power of taxation*, as being the source of the credit of the United States and the means of maintaining it, and denounced the use of prohibitions, pains, and penalties for such a purpose. As before stated, the result showed better than able, exhaustive argument that the law was *not a necessary and proper exercise of power in the premises.* When the law was passed, gold stood at 1.89; when repealed it stood at 2.85, the very highest point reached.

B.

Nor do we admit that this statute was, in effect, declared valid in *Veazie* vs. *Fenno*, 8 Wall., 548–9. That case simply settles the authority of Congress to tax the issue of State banks—oppressively perhaps—so that it became profitless for the banks to issue any currency; but it did not establish the right to *prohibit* banks from making issues of currency generally. The power to *tax* is not and should not be confounded with a power to forbid, prohibit, make penal. Thus, my land may be taxed so that I find it unprofitable to own land—I sell out. And so of other property, as a tax upon carriages and the like. Now there are various ways of effecting taxation. Thus the Congress issues non-taxable bonds in order to negotiate them among

the citizens of the United States at the lowest rate of interest, since high interest increases taxation, and so much property, therefore, is withdrawn from taxation, and the burden that otherwise should fall upon it falls upon the other property of the people, which is a scheme of indirect taxation, levied and collected by Congress without any other machinery attending it. So a State or local municipality may not tax Government securities for the reason that to do so would deprive the Government of so much of its revenues—in that municipality at least—which would have to be made up by taxation elsewhere or otherwise; besides, such taxation might be so excessive as to make it unprofitable to hold or purchase Government securities at all, and virtually drive them from the market. So we concede that the Government paper evidences of its debts cannot be made a subject of taxation for any sound reason, while the evidence of debt made by others Congress may derive a revenue from by taxation. But taxation is not a power of *prohibition*—it must stop short of that to be taxation.

C.

Neither do we concede that Congress can make its own "evidence of debt," lawful money. These papers remain all the time and everywhere just what they are, and read, viz: evidences of debt, *promise to pay money*, and nothing else. To be sure the quality of legal-tender has been given to them by Statute. But that only amounts to this, viz: The debtor may offer to *substitute* the promise of the Government *to pay* the dollar that *he* has promised to pay, and the power of the land as execrcised through the Courts *is withdrawn* from the creditor on such tender being made to him to enforce the contract further against the debtor or his property. That is all. The creditor is left *remediless after that.* He has not the promised dollar yet, but has by the option of his debtor the Government's promise that at

some time—on demand, *perhaps soon*—he will get it. Whenever Congress makes *anything coin*, its stamp must import not a promise of something not yet presented, but a quality and quantity in the thing actually presented. If it be gold, silver or any other metal, a given quantity of a given quality must be provided. So if it be made of other material, as paper for instance. The stamp must import that it is paper made of some substance as linen, silk or cotton, and that there is so much of it under that stamp, otherwise the stamp will signify nothing. The *value* of money coined, not of gold or silver, is simply a matter of speculation, probably of dreams.

D.

The case of *United States* vs. *Marigold*, 9 How., 567–8, we do not conceive to be pertinent. The case decides that Congress may control its own currency and no one may imitate or counterfeit it. Certainly, everywhere there is legislation against forgeries and fraudulent imitations of every species of paper; but no question of this kind is involved here, and no inference can be drawn from that case affecting the one at bar.

E.

In regard to the letter from Mr. Jefferson, cited, I reply that Jefferson was not then discussing the *powers* of Congress, least of all the power to suppress "all paper circulating during peace, etc.;" and gives no opinion whether Congress has or has not such power. He is stating some abstract proposition, which to be put in force in the United States would require an amendment to the Constitution—but what Jefferson thought about borrowing money on the credit of the United States is, I apprehend, quite well known. An extract from one of his letters to James Madison, 2 vol. p. 376 of his works, touches upon that subject, and is pertinent here, viz: "While there (at

Amsterdam), I endeavored to get, as well as I could, into the state of national credit there; for though *I was an enemy to using our credit*, but under absolute necessity, yet the possessing a good credit, I consider indispensable in the present system of carrying on war. The existence of a nation, having no credit, is always precarious. The credit of England is best. Their paper sells at par on the exchange of Amsterdam the moment any of it is offered; and they command there any sum they please. The reason is, that they never borrow without establishing taxes for the payment of the interest; and they never yet failed one day in that payment." * * * In this way our paper will be kept up at par, and *this alone* will enable us to command in four and twenty hours, at any time, on exchange at Amsterdam, as many millions as that capital can supply, etc." Here we have not one word about the suppression of all paper circulation at any time, advanced; but an earnest recommendation is made to tax and pay as we promise, instead of suppressing and prohibiting the promises of others, as a means to build up and maintain a credit that will at any time in twenty-four hours command millions of money. And Mr. Calhoun occupied almost identical ground with Jefferson on this subject. He thought that Government credit, at all times, should be maintained by *revenues*, so that it would not be as liable to fluctuation as individual credit; and he has not left behind him a suggestion that Government can, under the Constitution, interfere with State currency, or can maintain or establish its credit by suppressing in any form the use of their credit by others.

Secondly.

On the first question raised by demurrer, viz: whether the obligations as set out are embraced in any valid law of the United States. I have anticipated the substantial points made by the Government. But it is said if the respond-

ents escape it is "because of the cunning phraseology on the part of the maker of the instrument." We think that substantially expresses the case. The instruments in fact are so wisely or cunningly, if you please, worded that they express what was intended, viz: that the Bangor Furnace Company would pay the bearer fifty *cents in goods at their* store in Bangor, Michigan, so that their could be no mistake about it. They had no desire to violate a law of Congress, and carefully avoided even the appearance of doing so by the use of proper words expressing their true contract. And certainly a strict construction of the statute by the court is expected, for such is the rule, in order that the respondent may not be put upon a criminal trial for entertaining motives and intentions that the act done neither supports nor suggests, and which, in the nature of things, could work no injury to the United States.

The statute of Michigan is cited. Well, we say the respondent has not violated that statute, as no one in Michigan pretended, and if he had it would hardly be a sufficient reason for indicting him under the one at bar. I have not gone extensively into the discussion of cases and statutes. Conceiving that the elementary principles discussed determines the questions in the case, as we think is made clear by the opinion in *United States* vs. *Isham*, 17 Wall., 496.

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